2000

State of Utah v. Dennis D. Kazda : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DENNIS D. KAZDA,

Defendant-Appellant.

Case No. 14201

BRIEF OF RESPONDENT

APPEAL FROM A JURY VERDICT OF GUILTY IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR TOOELE COUNTY, STATE OF UTAH, THE HONORABLE GORDON R. HALL, JUDGE, PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with theft, a felony of the third degree.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury on the 12th and 13th days of June, 1975, before the Honorable Gordon R. Hall, Judge. Appellant was found guilty of theft and sentenced to serve an indeterminant term of up to five years in the Utah State Prison. This sentence is to run concurrently with one of the same length which appellant is presently serving.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the conviction affirmed.

STATEMENT OF THE FACTS

On October 1, 1974, three men came onto the Hogan Ranch, in Tooele County (T. 30,31). The men began to cut copper telephone wire from the telephone poles (T. 33). Mr. Hogan felt suspicious and called the sheriff (T. 32). The sheriff contacted the telephone company and learned that no one was authorized to be taking down any wire at the Hogan Ranch (T. 59). Telephone employees and the sheriff arrived at the scene and the three men were arrested (T. 183, 184). The men were identified as Dennis Kazda, appellant in this case, Max Stockton and Max Reay (T. 170). All of the above is undisputed.

Another fact, however, was strongly disputed. Appellant testified that he had a contract to remove the wire (T. 176). Appellant claimed that he met a Mr. Johnson who represented himself as an employee of the telephone company (T. 173,174). Appellant further claims that this Mr. Johnson agreed to pay him for removing wire from telephone poles (T. 175).

It is very interesting that appellant related that he and this Mr. Johnson went to the ranch on September 26th so Mr. Johnson could show him which lines to take down (T. 172). On that day a ranch

employee, Mr. Degelbeck, saw appellant and another man drive up to the ranch and stop (T. 17). Degelbeck was only twenty-five yards from the men who got out of their truck (T. 212). From that short distance Degelbeck could see appellant and the man who appellant swears was Mr. Johnson (T. 172). However, significantly, Mr. Degelbeck identified the second individual not as Mr. Johnson, but as Max Reay, a codefendant of appellants (T. 213).

Mr. Degelbeck's identification of Reay is corroborated by the fact that Mr. Degelbeck said that the man had a limp (T. 18). One month later at the preliminary hearing Mr. Degelbeck again saw Mr. Reay and testified that he limped at that time also (T. 216). Furthermore, the sheriff who arrested Reay testified that Reay complained about his foot and had a light cast on it (T. 115). It seems that the only significant question of fact for the jury was whether or not Mr. Johnson and the contract ever existed.

POINT I

ON APPEAL, APPELLANT MAY NOT CHARGE AS ERROR THE TRIAL COURT'S FAILURE TO GIVE A CERTAIN INSTRUCTION WHEN APPELLANT NEITHER REQUESTED THE INSTRUCTION NOR CALLED THE COURT'S ATTENTION TO ITS OMISSION.

Appellant alleges that the trial court committed error in that it failed to give an instruction concerning the defense of "Mistake - of-fact." Appellant cites State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936), and other cases in support of the proposition that when a court fails to instruct on a certain point, and no timely exception is taken, in certain circumstances the Supreme Court may consider the alleged error on appeal. Respondent contends that appellant misconstrues the holding of Cobo and the law in Utah. It is true that the Supreme Court may, under special circumstances, consider the fact that a trial court gave erroneous instructions even though no timely exception was taken, and that notice may be taken when requested instructions are denied. Respondent, however, submits that when a certain instruction was neither requested nor called to the attention of the court, the rule in Utah is that the unchallenged failure to give it will not be noticed on appeal.

In State v. Cobo, supra, the trial court gave a certain instruction to the jury which was incorrect and prejudicial. The defendant, however, failed to object to the instruction. On appeal, the Supreme Court of Utah noted the error anyway and reversed the conviction.

Therefore, Cobo is no authority for appellant in the instant case. There is a great difference between giving an erroneous instruction as in Cobo, and not giving an unrequested instruction as in the instant case. This distinction was pointed out and clarified in the later case, State v. Peterson, 121 Utah 229, 240 P.2d 504, 507 (1952), wherein the Utah Supreme Court said:

> "We have held that where instructions are palpably erroneous . . . we may notice the error without exception having been taken. State v. Cobo . . . . But, we are aware of no holding that the mere failure to give an instruction which might have been given but which was not requested or called to the attention of the court, and no exception taken to the failure to give it, will be noticed on appeal." (Emphasis added.)

The Utah Supreme Court made the same statement in State v. Dubois, 98 Utah 234, 98 P.2d 354, 360 (1940), but also added:

> "Having approved the instructions as given and requested no others, counsel should not be heard to complain that the Court did not constitute itself counsel in the cause, and submit other theories not urged by the defendant . . . . It is the court's duty to try the issues . . . and not to make the case for them."

Other jurisdictions are in accord with the Utah position. The Washington Supreme Court said:

> "Misdirection may be error, but nondirection, in the absence of a request, is never error." State v. Myers, 53 Wash.2d 446, 334 P.2d 536, 539 (1959).

The Supreme Court of Idaho said:

> "If the appellant desired further instructions on a particular point it was his duty to request them. . .and in the absence of such request error cannot be assigned." State v. Kelly, 95 Idaho 851, 521 P.2d 1150 (1974).

See also holdings from Arizona, State v. Taylor, 109 Ariz. 481, 512 P.2d 590 (1973), and Montana, State v. Peters, 146 Mont. 188, 405 P.2d 642 (1965).

Respondent respectfully submits that appellant's Point One, the question of whether the jury should have been instructed on the defense of "mistake - in - fact," is not properly before this court and should be dismissed since appellant neither requested the instruction, called it to the attention of the court, nor made timely exception to the omission.

POINT II

EVEN IF THE COBO RULE WERE TO PROVIDE THAT UNREQUESTED INSTRUCTIONS COULD BE NOTICED ON APPEAL, THE PRESENT CASE WOULD NOT MEET THE REQUIREMENTS OF COBO.

As demonstrated in point one of this brief, the Cobo rule, an exception to the general rule that alleged errors will not be considered on appeal unless timely exceptions were made, does not comprehend the situation of the instant case, an instruction was neither given, nor requested or called to the attention of the court. However, even if the Cobo exception did provide that unrequested instructions could be noted on appeal, there are further requirements of the Cobo rule which are not met by the facts of the instant case.

The Cobo exception reads, in part, as follows:

> ". . . we think that when palpable error is made to appear on the face of the record . . . to the manifest prejudice of the accused . . . ." 60 P.2d at 958.

Obviously, before the Cobo exception can be used there must first be error, and, second, the error must be prejudicial to the accused. Case law over the years has indicated that even though error is found, if it is not prejudicial, the Cobo exception will not be used. State v. Trusty, 28 Utah 2d 317, 502 P.2d 113 (1972), State v. Murphy, 27 Utah 2d 98, 493 P.2d 617 (1972), and State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970). Respondent submits that there was no

error committed by the trial court and if there was, that error was not prejudicial to appellant.

The error claim by appellant is that the trial court failed to instruct the jury concerning a defense to theft known as "mistake - in - fact." It is admitted that the trial court did not use those exact words, however, the effect of the instructions given was the same as if those words had been used. In instruction number twelve the court said:

> "That is, a person acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to deprive the owner of property."
> (Emphasis added.)

It must be assumed that the jury understood this instruction. Therefore, the jury realized that they could not convict appellant if they found that he was unaware that what he was doing would deprive the owner, Mountain Bell, of its property. In other words, the jury was informed that they were to acquit if they found that appellant mistakenly thought that he had a valid contract with Mountain Bell. An added instruction using the words "mistake - of - fact" would have added nothing to the words "he is aware." It is no error to use different words which mean the same thing.

Finally, even if there was error in not giving the requested instruction, the error was not prejudicial to appellant. This is easily demonstrated by the fact that of the two codefendants tried together in the trial court below, only one, the appellant in this case, was convicted.

As indicated in the facts, appellant claimed that he made a contract with a Mr. Johnson to remove copper telephone wire (T. 174, 175). Appellant then testified that he later hired Mr. Stockton to help him remove the wire (T. 192). On cross-examination by Mr. Stockton's counsel appellant testified to the circumstances of his hiring Mr. Stockton. Appellant admitted that Stockton was not present when the alleged contract was made but only removed wire because of his (appellant's) representation that there was a contract (T. 192). So appellant's entire defense centered on his own claim that Mr. Johnson and the contract did exist. Mr. Stockton's entire defense also centered on appellant's claim that Mr. Johnson and the contract did exist. The jury found appellant guilty and Stockton innocent. Since both removed wire, what was the difference? The only logical explanation is that

the jury found that there was no Mr. Johnson and no contract and that appellant was not unaware of this, or mistaken - in - fact. At the same time the jury found that Mr. Stockton had an honest albeit mistaken belief, based on appellant's representation, that there was a contract. Thus, even though not instructed in exactly those words, the jury considered the "mistake - in - fact" defense. Therefore, even if the court erred by not instructing on "mistake - in - fact," it is clear that the jury considered that defense and the error was not prejudicial.

In summary, respondent contends that this court should not consider appellant's contention that the trial court erred in not instructing on the defense of "mistake - of - fact" since such an instruction was neither requested nor was its absence objected to. Respondent further contends that even if this court does consider appellant's contention, it will find no error since the "mistake - of - fact" defense was included in the jury instruction by the trial court, using different words. Respondent finally contends that even if the trial court did err in not using the words "mistake - of - fact" such error was not prejudicial since the jury considered that defense anyway in their deliberation. Appellant has not

carried his burden of proof on appeal and has not demonstrated prejudicial error; therefore, the conviction should be affirmed.

POINT III

THE COURT COMMITTED NO ERROR BY INSTRUCTING THE JURY AS TO THE DEFINITION OF THE TERM "RECKLESS INTENT."

Utah Code Ann. § 76-2-101 (Supp. 1975), states the Utah law on principles of criminal responsibility. That section reads:

> "No person is guilty of an offense unless. . . (1) he acts intentionally, knowingly, recklessly, or with criminal negligence. . . ." Utah Code Ann. § 76-2-101 (1975). (Emphasis added.)

Thus, appellant could have been convicted if he acted recklessly in removing the copper telephone wires. The trial court instructed on applicable Utah law just as it is in the Code. Instruction number twelve, which appellant claims was erroneous, simply defines the terms "Intentionally," "Knowingly," and "Reckless Intent." The court's instructions are almost duplicate of Utah Code Ann. § 76-2-103 (Supp. 1975), which provides:

"(1) Intentionally, . . . with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly. . .with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly. . .with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly . . . with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and justifiable risk that the circumstances exist or the result will occur. . ."

Instruction twelve provided:

1. "Intentionally" means that with respect to the nature of the defendant's conduct or a result of his conduct, it was the defendant's conscious objective or desire to engage in the conduct or cause the result.

2. "Knowingly" means that with respect to the defendant's conduct or circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. That is a person acts knowingly with respect to a result of his conduct when he is aware that his conduct is reasonably certain to deprive the owner of property.

3. "Reckless Intent" with respect to circumstances surrounding one's conduct means conduct which a person is aware of but consciously disregards that a substantial risk that a person's property will be taken unlawfully."

* * *

Since the instructions were identical in meaning with the Utah Code and since Utah Code Ann. § 76-2-101, supra, specifically states that intent can be "reckless," there was no error in submitting an instruction to the jury on Reckless Intent. Appellant's conviction should be affirmed.

CONCLUSION

The Supreme Court may not notice as an alleged error on appeal an instruction which was not given, when appellant neither requested the instruction nor objected to its absence. Even if this court could notice that type of error, there was no error in this case. Also, even if there was error it was not prejudicial. Furthermore, the trial court committed no error in instructing on reckless intent since the Utah Code requires and defines that term exactly as given by the trial court. Respondent respectfully requests this court to affirm appellant's conviction.

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